UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

WELLS WILSON, et al.,	)
	)
Plaintiffs,	)
	) Civil Action No. 1:16-CV-00990
v.	)
	) Judge Trenga
CITY OF ALEXANDRIA, VA.,	) Magistrate Judge Davis
	)
Defendant.	)
	)

MEMORANDUM IN SUPPORT OF JOINT MOTION TO APPROVE SETTLEMENT AGREEMENT

Defendant City of Alexandria, Virginia ("City") and the Plaintiffs, Fire Captains employed at various times by the City, have reached a tentative settlement agreement that will resolve all claims in the lawsuit, which alleged that the City failed to pay overtime in violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA") and Virginia state law, Va. Code §§ 9.1-701 *et seq.*, as well as those claims which could have been asserted in the lawsuit. For the reasons set forth below, because the proposed agreement satisfies the criteria for approval of an FLSA settlement, once the City of Alexandria City Council ("City Council") approves the tentative settlement, and provided that no Plaintiff submits a valid objection to the proposed settlement that is accepted by the Court at the Fairness Hearing scheduled for February 2, 2017, Plaintiffs and the City request the Court to enter an order: (1) approving the Settlement Agreement, which is incorporated herein by reference, as fair, reasonable, and just in all respects as to the Plaintiffs, and ordering the Parties to perform the Settlement Agreement in accordance with its terms; (2) reserving jurisdiction with respect to this Action for the purpose of enforcing

the Settlement Agreement; and (3) dismissing Plaintiffs' claims with prejudice upon final Court approval of the Settlement Agreement.

The Settlement Agreement is attached as Exhibit 1 and the declaration of Plaintiffs' lead counsel, Sara L. Faulman, is attached hereto as Exhibit 2.

I. Claims Asserted in this Case and Procedural History

The Plaintiffs are or were Captains employed by Alexandria's Fire Department ("City" or "Defendant"). Plaintiffs alleged that Defendant failed to pay time-and-a-half overtime pay to the Captains for hours worked in excess of the statutory maximum. The City asserted that the Captains were exempt from the FLSA as executives or administrators.

This lawsuit was preceded by a similar lawsuit filed by Fairfax County Captains in 2014, *Morrison v. Cnty. of Fairfax, VA* Civil Action No. 1:14-cv-5. Although the District Court initially ruled in favor of the County in *Morrison*, in June 2016, the United States Court of Appeals for the Fourth Circuit reversed the District Court's decision and entered judgement on the issue of liability for the Fairfax captains, finding that the undisputed facts demonstrated that the captains were entitled to overtime under the FLSA because their primary job duty was fire fighting. *Morrison v. Cnty. of Fairfax, VA*, 826 F.3d 758 (4th Cir. 2016).[1]

In its Answer, the City raised the administrative and executive exemptions, but also stated that if the Fourth Circuit's decision in *Morrison* became final, it expected to amend its Answer to remove the basic exemption issue from contest in the case. *See* Dkt. 4. Subsequently, the *Morrison* decision did become final and the parties, instead of litigating over the issues already decided in *Morrison*, focused discovery on other issues related to the calculation of damages, including whether Plaintiffs could carry their burden to establish that Defendant acted

[1] The *Morrison* case was extensively litigated, eventually settling in December 2016. *See Morrison v. Cnty. of Fairfax, VA* Civil Action No. 1:14-cv-5, Dkt. 166-1 at 4.

willfully thus entitling them to application of a three-year statute of limitations and whether the Defendant could prove that it acted in good faith thus avoiding the otherwise mandatory imposition of liquidated damages in an amount equal to Plaintiffs' back pay. *See* Dkt. 10.

After the parties began to engage in discovery, and exchanged information with an eye toward engaging in settlement negotiations, the parties scheduled a settlement conference. On December 19, 2016, the parties attended a settlement conference at Plaintiffs' counsel's office in Washington, DC. Four Plaintiffs represented the 35 Plaintiffs at the settlement conference, with the authority to recommend a settlement to the entire group of Plaintiffs. The City was represented by individuals with authority to recommend a settlement to the City Council. After approximately five and a half hours of negotiations, the parties reached an agreement in principle (the "Settlement").

Upon request of the parties, the Court held a telephonic status conference on January 4, 2017, during which it set the Fairness Hearing for February 2, 2017 in Courtroom 701. On January 6, 2017, the Plaintiffs filed a Notice of Fairness Hearing. Dkt. 21. On January 9, 2017, Plaintiffs' counsel sent each Plaintiff a letter informing the Plaintiffs of the terms of the Settlement and the risks and delay associated with continued litigation. The January 9, 2017, letter also provided the Plaintiffs with information about: (1) what the Plaintiffs are relinquishing by agreeing to the Settlement; (2) the specific amounts each Plaintiff will receive under the Settlement and how and when those amounts will be distributed; (3) accessing Plaintiffs' counsel's website to view each of the other Plaintiffs' recovery under the settlement; and (4) filing objections to the Settlement and the Fairness Hearing. Exh. 2, Faulman Dec. ¶ 20. To be heard at the Fairness Hearing, Plaintiffs are required to submit written objections to the Court

and to Plaintiffs' counsel by 5:00 p.m. on January 30, 2017. Exh. 2, Faulman Decl. ¶ 21. To date, not a single Plaintiff has submitted an objection to the Settlement. *Id*.

II. Terms of the Proposed Settlement

Counsel for the parties have since reduced the terms of the proposed Settlement to writing (the "Settlement Agreement"). Under the Settlement Agreement, the City will pay a total of $1,200,000 (one million two hundred thousand dollars) to resolve the Plaintiffs' FLSA claims allegedly accruing for the period from August 2, 2013 through November 19, 2016, which is the date that the City reclassified the Captain positions at issue in this case from FLSA exempt to non-exempt, and Plaintiffs' state-law claims ("the Settlement Amount"). Exhibit 1, Settlement Agreement ¶ 2.1. The Settlement Amount will be divided and distributed to Plaintiffs as follows: (1) one check payable to Plaintiffs' counsel, Woodley & McGillivary LLP, for statutory attorneys' fees and expenses in the amount of $100,000; (2) one check payable to Plaintiffs' counsel, Woodley & McGillivary LLP, in the amount of $550,000, as liquidated damages for distribution to the Plaintiffs; and (3) a set of payroll checks made payable to each Plaintiff, based on the gross back pay amounts set forth in Exhibit A to the Settlement Agreement less all applicable deductions and withholdings for that individual Plaintiff, constituting his or her share of the back pay award in the total amount of $550,000 ("the Back Pay Amount"). *Id.* These amounts are agreed to among the Parties to compromise, settle, and satisfy the Released Claims described in paragraph 3.1 of the Settlement Agreement, liquidated damages related to the Released Claims, and all attorneys' fees and expenses related to the Released Claims.

For purposes of computing the gross amount of back pay and liquidated damages for each Plaintiff, Plaintiffs relied on the payroll data for each Plaintiff produced by Defendant in discovery. The calculation methodology used by Plaintiffs computes an additional half-time pay

(i.e., half the Plaintiff's regular rate of pay) for each hour of overtime worked above the 212-hour threshold in a 28-day work cycle for each Plaintiff, including hours spent in a paid leave status. The computations are based on actual payroll records produced by the City for the entire recovery period through November 19, 2016. For purposes of the settlement computations and distributions, each Plaintiff's recovery period begins, at the earliest, on August 2, 2013, and ends, at the latest, on November 19, 2016, which is the last day that any Plaintiffs were treated by the City as fully exempt from the FLSA in the Captain rank. Based on Plaintiff's calculations, the total amount of back pay for this period for all Plaintiffs, is $796,220.74, if not a higher amount due to differences in calculation methodology. The excess settlement monies obtained for the Plaintiffs (i.e., the $303,779.26) are treated as liquidated damages and equal approximately 38.15% of the back pay. Because Defendant has a different view regarding the length of the recovery period and Plaintiffs' entitlement to liquidated damages, the total amount of back pay and liquidated damages recovered under the Settlement will be divided in half, with 50% comprising liquidated damages, and 50% comprising back pay. Plaintiffs and their counsel were solely responsible for determining the allocations among Plaintiffs and determining the distribution of funds. Exh. 1, ¶ 2.5.

In consideration of the payments provided, Plaintiffs will release all of their federal and state wage and hour claims against the City up through November 19, 2016. The release and the covenant not to sue are set forth in ¶¶ 3.1, 3.2 and 3.3 of the Settlement Agreement.

As explained further in Section V below, assuming that no Plaintiff files a valid written objection prior to or at the February 2, 2017, Fairness Hearing, and that the City Council approves the Settlement Agreement at its January 24, 2017, meeting, the parties will file a supplemental memorandum on or about February 3, 2017, notifying the Court that the parties have executed the

Settlement Agreement and waiving a further hearing, along with a Proposed Order granting final approval of the Settlement Agreement. The Settlement Amount will be paid within 30 days of the date that the Court enters an Order approving the Settlement Agreement. Exh. 1, ¶ 2.2. The Settlement Agreement also provides that all of Plaintiffs' claims shall be dismissed with prejudice upon Court approval of the Settlement Agreement.

III. Applicable Factors for Approving FLSA Settlements

A settlement in an FLSA lawsuit is not effective unless it is approved by either a district court or the United States Department of Labor. *Lomascolo v. Parsons Brinckerhoff, Inc.*, 2009 U.S. Dist. LEXIS 89136, at *8 (E.D. Va. Sept. 29, 2009) (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1353 (11th Cir. 1982)). FLSA settlements in this Circuit will be approved when the court determines that the settlement "is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Id.* In evaluating the fairness of settlements under the FLSA, this court has relied on six factors: (1) the extent of discovery that has taken place; (2) the state of the proceedings, including the complexity, expense, and likely duration of the litigation; (3) the absence of fraud or collusion in the settlement; (4) the experience of counsel who have represented the Plaintiffs; (5) the probability of Plaintiffs' success on the merits; and (6) the amount of the settlement in relation to the potential recovery. *Devine v. City of Hampton, VA* 2015 U.S. Dist. LEXIS 177155 at *38 (E.D. Va. 2015) (citing *Patel v. Barot,* 15 F. Supp. 3d 648, 656 (E.D. Va. 2014)). Based on an analysis of these factors, as discussed below, the settlement is fair and reasonable and the parties request that it be approved.

IV. Application of the FLSA Factors to the Proposed Settlement

As discussed below, the parties believe that the proposed settlement terms in this case are fair and reasonable to the Plaintiffs and to the Defendant. The settlement represents a good faith

compromise of the parties' *bona fide* dispute regarding the amount of back pay and other relief to which the Plaintiffs are entitled based on the Fourth Circuit's conclusion in the *Morrison* case that Fire Captains, with very similar duties to the majority of the Plaintiffs here, are entitled to the overtime protections of the FLSA. This compromise was reached after arms-length negotiations between the parties.

A. The Extent of Discovery

The parties engaged in limited discovery targeted at the issues of willfulness and liquidated damages. Plaintiffs' counsel engaged in extensive interviews with the Plaintiffs to prepare for the case as well as to determine who would be selected to serve as representative plaintiffs. Plaintiffs also served a document request on defendants. In response, Defendant produced extensive payroll data for all the Plaintiffs. The parties both used the payroll data to calculate damages in the instant case. In addition, Defendant produced hundreds of pages of discovery regarding its efforts to comply with the FLSA, documents that Plaintiffs' counsel relied upon in determining its position at the settlement conference with respect to the issue of liquidated damages and the third year of eligibility. In addition, Defendant served all Plaintiffs with a set of discovery requests. After a number of conferences, the parties jointly agreed to limit Plaintiffs' discovery responses to a representative subset of Plaintiffs and Plaintiffs' counsel began working with the Plaintiffs on their responses to the discovery requests. Given that the parties engaged in targeted discovery with the intent of resolving this matter and were able to reach a settlement acceptable to both sides, this factor weighs in favor of settlement approval.

B. The State of the Proceedings Including the Complexity and Expense of Further Proceedings.

The parties here agree that the Fourth Circuit's decision in *Morrison* likely precludes application of the executive or administrative exemptions from the FLSA to most of the periods

worked by the Plaintiffs. On November 19, 2016, the City reclassified its Fire Captains as FLSA non-exempt, subject only to the partial exemption of FLSA section 7(k).

Accordingly, absent settlement, the Court would have to decide the following issues that affect the calculation of damages: (1) whether the Defendant can avoid the imposition of otherwise mandatory liquidated damages by proving that its actions were in good faith and objectively reasonable (*see* 29 U.S.C. §§ 216(b) and 260); and (2) whether the Plaintiffs can prove that they are entitled to a third year of liability because they have demonstrated that the City's violation was willful. *See* 29 U.S.C. § 255 (extending the statute of limitations for willful FLSA violations from two years to three years).

Given the various arguments on each side supporting each side's position, it is unclear how the Court would decide these issues. Both parties would likely appeal an adverse decision following summary judgment and/or a trial on the state-of-mind issues. Accordingly, the expense of further proceedings is great, as is the complexity of the remaining issues. This factor weighs in favor of settlement approval.

C. Possibility of Fraud or Collusion

Given the parties' arms-length negotiations, the parties believe that there was no opportunity for and no possibility of fraud or collusion. The parties' counsel represented their clients zealously and obtained what both sides consider to be an appropriate settlement.

D. Plaintiffs' Counsel's Experience in Wage and Hour Litigation

Plaintiffs' counsel are locally and nationally known leaders in the field of wage and hour law. (Faulman Decl. ¶¶ 2, 3, 12-15). The quality of the representation is best demonstrated by the substantial benefit achieved for the Plaintiffs and the effective prosecution and resolution of the litigation. The substantial recovery obtained for the Plaintiffs is the direct result of the significant

efforts of highly skilled and specialized attorneys who possess great experience in the prosecution of complex, multi-plaintiff wage and hour litigation. *Id*.

From the outset of the litigation, Plaintiffs' counsel engaged in a concerted effort to obtain the maximum recovery for the Plaintiffs and committed considerable resources and time in the research, investigation, and prosecution of this case.

E. Probability of Plaintiffs' Success on the Merits

While Plaintiffs believe that their legal position is strong, "[w]hatever the relative merits of the parties' legal positions, there is no risk-free, expense-free litigation." *Sheick v. Auto. Component Carrier LLC*, 2010 U.S. Dist. LEXIS 110411, at *50 (E.D. Mich. Oct. 18, 2010). Even though, due to the Fourth Circuit's decision in *Morrison*, the parties do not dispute the liability issue, there remain two significant damages-related issues yet to be decided. The ultimate resolution of these issues through litigation could result in Plaintiffs obtaining only a two-year recovery period and no liquidated damages. Alternatively, the outcome could result in the Plaintiffs obtaining a three-year recovery period and full liquidated damages.

1. Liquidated Damages

The FLSA provides that "[a]ny employer who violates the provisions of section 206 or section 207 of this title ***shall*** be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, ***and in an additional equal amount as liquidated damages***." 29 U.S.C. §216(b) (emphasis added); *see also Lockwood v. Prince George's County*, 2000 U.S. App. LEXIS 15302 at *17 (4th Cir. June 29, 2000) (upholding a finding that fire investigators were entitled to FLSA overtime and an award of liquidated damages, noting that liquidated damages were "the norm" for FLSA violations).

The only potential defense to an award of liquidated damages is if the "employer shows to the satisfaction of the court that the act or omission giving rise to [the violation of the FLSA] . . . was in good faith ***and*** that [the employer] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." 29 U.S.C. §260 (emphasis added). The burden of proving good faith under section 260 of the FLSA is on the employer, and the burden to do so is substantial. *Lockwood*, 2000 U.S. App. LEXIS 15302 at *18 (citing *Mayhew v. Wells*, 125 F.3d 216, 220 (4th Cir. 1997) (the employer bears a "plain and substantial burden")); *see also Arasimowicz v. All Panel Systems*, 948 F. Supp. 2d 211, 226 (D. Conn. 2013) (the employer's burden "is a difficult one") (citations omitted).

While Plaintiffs believe that a full award of liquidated damages is mandatory on the record here, the City would argue the opposite. The City would argue, among other things, that the Fourth Circuit's decision in *Morrison* was ground-breaking and that until it was handed down, the City acted in conformance with earlier decisions in this Circuit, including a previous decision regarding the City's own Fire Captains, *Int'l Ass'n of Firefighters v. City of Alexandria*, 720 F. Supp. 1230 (E.D. Va. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990), and that it acted reasonably and in good faith in classifying the positions at issue, especially given the involvement of taxpayer funds. Meanwhile, Plaintiffs would argue that the discovery in this case indicated that City was aware that the Plaintiffs were likely misclassified under the FLSA, because Defendant's outside counsel had recommended that the City consider reclassifying Fire Captains as FLSA non-exempt in July 2013. Each side believes they have the better argument, and appeal would be possible regardless of this Court's decision, which would result in delay and additional expense. Accordingly, settlement with some liquidated damages paid on top of the back pay within 30 days of Court Approval is reasonable for Plaintiffs.

2. Three-Year Statute of Limitations

The FLSA provides that non-willful violations are subject to a two-year statute of limitations. However, "when the [defendant's] violation is willful, a three-year statute of limitations applies." *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 357 (4th Cir. 2011) (citing 29 U.S.C. § 255(a)) (internal citations omitted). In 1988, the Supreme Court issued its decision in *McLaughlin v. Richland Shoe Company*, finding that an employer's violation of the FLSA is willful within the meaning of Section 255(a) where it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." 486 U.S. 128, 133 (1988). A violation is not willful if "an employer acts reasonably in determining its legal obligation." *Id*. at 134. The Fourth Circuit has found that employers act recklessly when they have "notice, actual or constructive[,] of the existence and general requirements of the FLSA." *Chao v. Self Pride, Inc*., 232 Fed. Appx. 280, 287 (4th Cir. 2007).

Plaintiffs believe they could carry their burden of proof of a willful violation based on facts that demonstrate the City was notified by its counsel in July 2013 that there was at least a possibility that its practice of classifying the Fire Captains as exempt following the issuance of the 2004 First Responder regulation was unlawful. The City, however, would argue that Plaintiffs cannot prove a willful violation because, among other considerations, the City acted in conformance with the state of the law and because, for a large portion of the recovery period, there was a decision out of this Court in *Morrison* finding that employees with job duties similar to most of the Plaintiffs were FLSA-exempt executives. Based on the foregoing dispute, a settlement that pays a full three years of back pay (i.e., back to August 2013) and extends up to the date that the Plaintiffs were reclassified as FLSA non-exempt is an excellent outcome for the Plaintiffs.

F. The Amount of the Settlement in Relation to the Potential Recovery

The potential recovery if Plaintiffs won full liquidated damages and a three-year recovery period for a willful violation[2] is $1,592,441.48. If Plaintiffs were to lose on liquidated damages and the third year, the recovery would be approximately $657,000. The range of potential recovery was in flux.

The settlement (exclusive of statutory fees and expenses) is $1,100,000. While this is not a complete victory for Plaintiffs, it is nearly $450,000 higher than their worst potential outcome and includes an additional nearly 67 percent in liquidated damages when using a two-year statute of limitations or 38 percent in liquidated damages when using a three-year statute of limitations. Given the substantial litigation risks going forward for both sides, as well as the delay and expense related to obtaining final decisions on the outstanding issues, the settlement is fair, reasonable, and adequate and the result of arms-length bargaining with qualified, experienced counsel representing authorized, knowledgeable settlement teams. For this reason, too, the settlement should be approved.

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[2] Under the settlement, Plaintiffs will recover $100,000.00 in statutory fees and expenses from the Defendant. As set forth in the Faulman Declaration, Plaintiffs submitted their listing of fees to Defendant on January 6, 2017, and their listing of expenses on January 12, 2017. Exh. 2, Faulman Dec. ¶¶ 7, 17. From January 1, 2016, through December 31, 2016, the fees equaled $107,777.20, and the expenses equaled approximately $2,804.78, for a total of $110,581.98. Exh. 2, Faulman Dec. ¶7. The recording of time and services by Woodley & McGillivary LLP was done on a contemporaneous basis, and that information was accurately extracted from the firm's billing records to prepare the summary fee listing that was provided to opposing counsel. Exh. 2, ¶ 9. According to the Faulman Declaration, all of the time and expenses were, in fact, necessarily and reasonably expended on behalf of the Plaintiffs in this case. *Id.* at ¶ 10. *See also, Id.*, ¶¶ 12-15 (describing the services performed by each attorney working on the case) and ¶ 17 (setting forth the amount of expenses). An award of fees and expenses is mandatory under the FLSA to the prevailing plaintiff. 29 U.S.C. § 216(b).

V. Conditions and Timetable for Finalization and Approval

Assuming the City Council approves the Settlement Agreement at its January 24, 2017, meeting, that no Plaintiff files a valid objection to the terms of settlement prior to or at the February 2, 2017, Fairness Hearing, and the Court concludes at the Fairness Hearing that the terms of the settlement are fair and reasonable, the parties will execute the Settlement Agreement and will file a supplemental notice in support of this Motion, informing the Court of the same, waiving a further hearing, and requesting that the Court enter an Order granting final approval of the Settlement Agreement and dismissing the Action with prejudice.

VI. Conclusion

For all of the above reasons, the parties believe that this proposed settlement will successfully provide appropriate overtime compensation for Plaintiffs. Accordingly, the parties respectfully submit that the proposed settlement is fair and reasonable and should be approved by the Court.

Respectfully submitted,

/s/ T. Reid Coploff___________________

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

/s/ T. Reid Coploff
T. Reid Coploff